

# **Implementing the Water Environment and Water Services (Scotland) Act 2003:**

## **Promoting an Integrated Approach**

A Policy Statement

**July 2008**



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## 1. INTRODUCTION

Under the Water Environment and Water Services (Scotland) Act 2003 (the WEWS Act), Scottish Ministers, SEPA and public bodies have a general duty to protect the water environment when carrying out their wider functions. In certain circumstances, the WEWS Act provides powers to designate certain functions of Ministers, SEPA, and other public bodies, bringing this general duty into sharper focus and providing greater certainty of co-ordinated and successful outcomes.

This policy statement aims to highlight Ministers' responsibilities in relation to the water environment. Our equivalent policy in relation to public bodies was previously set out in our policy statement of 2006.<sup>1</sup> For a complete picture, these policy statements should be read together.

This paper also provides a platform for highlighting the need for an integrated approach to the delivery of our WFD obligations. In many cases a collaborative approach is already being adopted, and this is leading to real benefits 'on the ground'. Such an integrated approach to policy development and delivery will enable us to maximise the sustainable use of Scotland's water resources.

### **Relevant Enactments - General Purpose and Principles**

Section 2 of the WEWS Act introduced a general duty for the Scottish Ministers and every public body and office-holder to have regard to the desirability of protecting the water environment when exercising any functions.

It also gives the Scottish Ministers the power to specify, by order, any piece of legislation as a WEWS Relevant Enactment where that legislation gives statutory functions to the Scottish Ministers and/ or SEPA and those functions are relevant to the water environment.

The Scottish Ministers and SEPA will be required to exercise their functions under the relevant enactments in a manner which secures compliance with the requirements of the Directive, thus contributing to the overall achievement of its aims and objectives.

In addition, section 2(4) of the WEWS Act provides that the Scottish Ministers and SEPA must, in exercising their functions under the relevant enactments to secure compliance with the Directive –

- have regard to the social and economic impact of such exercise of those functions,
- so far as is consistent with the purposes of the enactment in question:
  - (i) promote sustainable flood management, and
  - (ii) act in the way best calculated to contribute to the achievement of sustainable development, and
- so far as is practicable, adopt an integrated approach by co-operating with each other, and with the WEWS Responsible Authorities, with a view to co-ordinating the exercise of their respective functions.

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<sup>1</sup> <http://www.scotland.gov.uk/Publications/2006/03/08143009/6>

## **2. POLICY FRAMEWORK FOR PROTECTING THE WATER ENVIRONMENT**

The WEWS Act transposed the requirements of the Directive into Scots law, introducing a broad framework for the management of our rivers, lochs, groundwater and coasts. The introduction of this framework represents a significant shift in water resource management, requiring us to adopt a holistic source-to-sea approach through the introduction of River Basin Management Plans (RBMPs). For the first time we will be able to take a more strategic look at the water environment, on a river basin scale. As the lead competent authority for protection of the water environment in Scotland, SEPA is responsible for the preparation of the draft RBMPs. This process is now underway, and the first draft plan will be published for consultation during 2008. The RBMPs will be finalised in December 2009, and updated every 6 years thereafter.

Throughout the implementation programme our overarching aim is to establish a framework within which an appropriate balance can be struck between the protection of the water environment and its use for the purposes of sustainable social and economic development. In order to achieve this balance in the most effective and constructive way possible, we believe it is essential that WFD principles are embedded in all other relevant policy and regulatory areas. For example, those relating to energy, public water supply, transport, land-use planning, fisheries, enterprise, recreation and tourism, marine and agriculture.

The draft Plans, due to be published in December 2008, will set out the contributions which those engaged in these various policy areas will make to the delivery of our WFD obligations; and will identify any additional policy or legal mechanisms that we need to put in place to achieve those objectives. Clearly this is a significant challenge, and continued integration with other policies will be essential to deliver a successful outcome.

**This paper discusses one important legislative mechanism for supporting that necessary integration.**

### **The Scottish Government's River Basin Management Planning Network**

Since the introduction of the Water Framework Directive, the Scottish Government has been promoting an integrated approach to developing or reviewing policy and legislation having an impact on the water environment. With the continuing move towards the development of River Basin Management Planning, a cross-Government RBMP Network was established to formalise this ongoing work, with a focus on supporting the development of the RBMPs. The Network includes key policy representatives from land-use planning, transport, energy, fisheries, enterprise, recreation and tourism, marine, agriculture and the water industry.

The aim is to provide a forum within which we can maximise the potential synergies between different policy interests and minimise any conflicts in delivering policy initiatives. A further benefit will be the ability to utilise this forum for identifying and agreeing whether any emerging elements of the draft programme of measures within the RBMP might require underpinning by new legislation and/ or delivery mechanisms, and the subsequent development of such mechanisms.

### 3. DEVELOPING AN INTEGRATED LEGISLATIVE FRAMEWORK

We have previously taken a number of legislative steps to facilitate and formalise the delivery of our vision of a collaborative and integrated approach to the protection of the water environment in Scotland. An outline of these steps is presented below:

- **Designating the Water Environment (Controlled Activities) (Scotland) Regulations (CAR) as a Relevant Enactment<sup>2</sup>**

The WEWS Act imposes an explicit duty on the Scottish Ministers and SEPA to exercise their functions under the Act in a manner which secures compliance with the requirements of the Directive. As well as introducing River Basin Management Planning, the WEWS Act allows Scottish Ministers to introduce a range of secondary legislation to ensure that Scotland's water environment is protected appropriately. As a result, CAR was introduced in 2005 to regulate activities which have the potential to impact on the water environment in Scotland, such as discharges, abstractions, impoundments and engineering works in the freshwater environment. We have now extended this explicit duty to the functions of Ministers and SEPA under CAR.

- **Designating WEWS Responsible Authorities<sup>3</sup>**

This process identified those public bodies (for example, local authorities and Scottish Water) whose day-to-day activities have a particularly high degree of relevance to the water environment in Scotland, and placed them under an explicit obligation to secure compliance with the aims and principles of the Directive when exercising certain statutory functions. In doing so, the responsible authorities are also required to take account of the social and economic impact of the exercise of those functions; and to work collaboratively with each other, Ministers and SEPA.

- **Wider legislative amendment programme**

Certain pre-existing regimes have such relevance to the water environment that more direct action was required to ensure a transparent, integrated and effective approach. Accordingly, we have aligned key regimes with the aims of the Directive, the WEWS Act and CAR, by making amendments to existing legislation. More detail can be found in our WEWS Annual Report to Parliament 2006.<sup>4</sup>

**It will be essential to ensure that WFD aims and objectives are embedded into any new legislation that has a potential impact on the water environment, such as land use planning, flood management or marine legislation.**

Alongside the statutory mechanisms discussed above, the Scottish Government is continuing to work closely with our partners and stakeholders to integrate and align other policy mechanisms such as guidelines and administrative arrangements, to support efficient delivery of not only WEWS and CAR but also future RBMPs and their implementation.

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<sup>2</sup> <http://www.opsi.gov.uk/legislation/scotland/ssi2006/20060554.htm>

<sup>3</sup> <http://www.opsi.gov.uk/legislation/scotland/ssi2006/20060126.htm>

<sup>4</sup> <http://www.scotland.gov.uk/Publications/2007/03/26092203/4>

## 4. PURPOSE OF DESIGNATING WEWS RELEVANT ENACTMENTS

### 4.1 General purpose of designation

As discussed above, in the light of the duties set out in the WEWS Act on Scottish Ministers, SEPA, and public bodies generally, we expect due regard to be given to the requirements of the Directive in any decision-making process which could have an impact on Scotland's water environment. Accordingly, we consider that all public bodies should adopt the following measures in appropriate circumstances in order to support the achievement of the Directive's aims.

- Engage all relevant parties and work collaboratively to resolve any possibility of conflict or duplication at the earliest possible opportunity when developing plans, policies, and legislation, or taking regulatory decisions that may have implications for the water environment;
- Have regard to the objectives set out in the River Basin Management Plans in carrying out their functions;
- Ensure that options for decision-making which could have an impact on the water environment take full account of WFD requirements so that the best environmental option is identified at an early stage;
- Achieve the most appropriate balance between the protection of the water environment and the social and economic impacts of that protection; and
- Comply with the Scottish Government's policy and advice on sustainable flood management.

In certain circumstances however, we do not believe that this general obligation is sufficiently transparent or robust to meet the Directive's aims. And it is for this reason that section 2 of the WEWS Act confers powers on the Scottish Ministers to clarify these existing obligations, where necessary, through the designation of WEWS 'responsible authorities' and 'relevant enactments'.

### 4.2 Benefits of designating relevant enactments

Identifying a piece of legislation as a WEWS Relevant Enactment places the Scottish Ministers and SEPA under an explicit duty to exercise their functions or powers under that legislation in a way that promotes the successful implementation of the Directive in Scotland. It also affords the Scottish Ministers and SEPA the necessary flexibility to ensure that a balanced approach can be arrived at in any particular case.

There are four associated benefits of designating WEWS Relevant Enactments:

The first of these is that the Scottish Ministers and SEPA must take into account the **social** and **economic impact** of the exercise of their functions when protecting the water environment. This flexibility enables a balanced, measured and proportionate approach which is tailored to the individual circumstances of a particular situation. For example, where the Scottish Ministers are approving an activity, such as a drought order under the Natural Heritage (Scotland) Act 1991, the approval or otherwise of that activity should involve consideration of the social and economic consequences of the decision-making process alongside environmental protection.

The second and third considerations relate to **sustainable flood management** and **sustainable development**. Sustainable flood management consideration means that the Scottish Ministers and SEPA must ensure that any flood prevention measures taken in the future work as closely as possible with the natural environment, ensuring protection for future generations. Similarly sustainable development considerations will ensure that our actions today do not limit or compromise the ability of future generations to meet their own needs. However both of these considerations apply only insofar as they are consistent with the purpose of the designated enactment.

Finally, designation also brings with it a duty for the Scottish Ministers, SEPA and the WEWS Responsible Authorities to **co-ordinate** the exercise of their functions. This is a core objective of our implementation strategy, designed to ensure a joined-up approach is taken to all areas of working. In turn, this will ensure an efficient approach to the protection of Scotland's water environment by minimising duplication of effort and, wherever possible, ensuring that operators are provided with consistent information, advice and or decisions.

#### **River basin management planning and advisory groups**

SEPA has established a network of Area Advisory Groups and a National Advisory Group to help in river basin management planning. The membership of these advisory groups includes responsible authorities, other public bodies and representatives of users of the water environment. Among other things, the groups provide a focus for communication and coordinated action between the different public bodies and for partnership with the private sector and environmental non-government organisations.

These advisory groups are helping to develop the RBMPs and will play a key role in the delivery of the environmental objectives set out in the plans.

## **5. LEGISLATION IDENTIFIED FOR DESIGNATION**

### **5.1 Criteria for assessing legislation**

In order to be a candidate for designation, a piece of legislation must contain **functions or powers** of the **Scottish Ministers and/ or SEPA** which are capable of being exercised in a manner which impacts directly on the delivery of our objectives for Scotland's water environment.

Ministers will primarily look to WEWS and CAR to deliver these objectives. However there are other significant legislative regimes which could have an impact on the delivery of our objectives for Scotland's water environment, and we consider it desirable to place an explicit obligation on Ministers and SEPA to secure compliance with the Directive when exercising functions under these other regimes.

By promoting early consideration of the water environment and river basin management planning objectives, we will facilitate an integrated approach and help to ensure that the best environmental option is identified at the outset (for example, the location of a proposed development or the design of sustainable flood management schemes). This approach is in line with our policy approach to the designation of responsible authorities, thus ensuring that all bodies concerned with activities having an impact on the water environment are working together to deliver our WFD goals from the outset.

### **5.2 Legislation identified for designation**

This section of the paper outlines each enactment identified for designation under section 2(8) of the WEWS Act, and provides a summary of the key reasons for the designation.

There are 8 key policy areas where we have identified designations, to facilitate a joined-up approach to securing compliance with the WFD. These are as follows:

- Marine and coastal activities
- Freshwater fisheries
- Rural land management
- Sustainable transport
- Land-use planning
- Sustainable flood management and surface drainage
- Water supply
- Environmental legislation

These matters are discussed in more detail in section 6.

### **5.3 Revised designation of Responsible Authorities**

This exercise has also highlighted some gaps in our designation of responsible authorities made in 2006. These are discussed in more detail in section 6.

## **6. LEGISLATION IDENTIFIED FOR DESIGNATION**

This section discusses the legislation identified for designation. It also sets out several examples of legislation not considered appropriate for designation and our thinking behind that conclusion.

### **6.1 Marine and coastal activities**

#### **Policy context**

Scotland's rich and biologically productive marine environment has immense economic and iconic value. All of its uses depend fundamentally, and in an essentially inter-connected way, on the quality of the marine environment. Many of these uses take place in the coastal zone; and WFD provides us with the potential to manage the quality of our coastal waters in an integrated way, to ensure these uses are sustainable.

The WEWS Act sets out the broad framework for delivering our obligations under the WFD. However, the scope of CAR is determined by the definitions of 'controlled activities' under WEWS, which specifically excludes SEPA from regulating engineering activities in transitional and coastal waters (TRAC). This approach was taken as Fisheries Research Services (an Executive Agency of the Scottish Government) already have powers to regulate activities of an engineering nature in TRAC waters, via the Food and Environment Protection Act (Part II). The Scottish Government is considering how to take forward the delivery of Ministers' WFD obligations in TRAC waters. As a first step, proposals for applying WFD-compliant standards and conditions in TRAC waters will be brought forward in 2008<sup>5</sup>.

However it is important to note the wider context within which these considerations sit. The Scottish Government is currently considering the formulation of policy in relation to a Scottish Marine Bill. In the longer term our continuing WFD obligations in respect of coastal waters should be addressed by developments in that arena.

#### **Food and Environment Protection Act 1985** ("FEPA")

Part II of FEPA (as amended) regulates, amongst other things, deposits associated with engineering works in coastal waters. In particular, section 5 of FEPA sets out a requirement for a licence to be obtained in certain circumstances for the deposit of substances and articles in the sea or under the sea-bed. The procedures to be applied by the licensing authority in determining whether to issue such a licence are then dealt with by section 8 of FEPA. Section 10 of FEPA also affords the licensing authority the power to take remedial action where a licence has not been obtained, or has not been complied with, where necessary or expedient for, amongst other things, the purpose of protecting the marine environment or the living resources which it supports, and to recover the costs of so doing from any person convicted of an offence in relation to the operation.

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<sup>5</sup> A Scottish Government consultation is expected to be published in the summer of 2008.

In Scotland the responsibility for issuing FEPA licences has been largely devolved to the Scottish Ministers, and the licensing scheme is administered and executed on their behalf by the Marine Laboratory, Aberdeen which is part of the Fisheries Research Service. There are however reservations in respect of oil and gas exploration and exploitation within UK waters beyond 3 nautical miles from the coastal baseline, or from operations falling within the subject matter of Part VI of the Merchant Shipping Act 1995 (Prevention of pollution) anywhere within UK waters, where the licensing authority is the Secretary of State.

In order to support the delivery of the Directive's requirements in Scotland – in particular as regards the hydromorphological impacts of activities in transitional and coastal (TRAC) waters – we propose to specify FEPA as a WEWS Relevant Enactment. This will place an express duty on the Scottish Ministers (FRS) to secure compliance with the requirements of the Directive when carrying out these functions.

This approach will provide an appropriate platform from which to review current operational policy and practice in respect of the granting of licences under section 5 of FEPA, in order to deliver the Directive's aims; for example, by making clear our expectation that henceforth the relevant WFD environmental standards and conditions must be applied to licences covering engineering activities carried on in TRAC waters.

### **Future steps**

We will use the development of the forthcoming Marine Bill to incorporate WFD obligations. It is likely that once the Bill is enacted, it will be identified for designation as a WEWS relevant enactment

## **6.2 Freshwater fisheries and aquaculture**

### **Policy context**

Freshwater fisheries are a key beneficiary of any improvements to the water environment. Critically, those involved in the management of freshwater fisheries also play a key role in managing the water environment. Delivery of Fisheries Management Plans and future Eel Management Plans will need to be coordinated with the delivery of river basin management planning. Ultimately the aim is that fisheries considerations, including those currently the responsibility of the Fisheries Committee, will be embedded within the CAR authorisation process.

The aquaculture industry focuses on salmon, with other important sectors including trout and shellfish. Salmon farming takes place in cages in both fresh and salt water while trout production mainly takes place in fresh water. The development of the aquaculture sector is a key Ministerial priority.

## **Aquaculture and Fisheries (Scotland) Act 2007** (“the 2007 Act”)

Part 1 of the 2007 Act underpins the Scottish Government’s policy to address problems common to both aquaculture and wild fisheries, and to seek solutions to ensure the maintenance of healthy stocks of wild fish whilst at the same time promoting a sustainable aquaculture industry. In particular, steps have been taken to formalise arrangements for best practice to control parasites at fish farms and shellfish farms in Scotland, for example by promoting a co-ordinated approach to the chemical treatment of parasites on a catchment level.

However, as a contingency where best practice arrangements for the treatment regimes of sea lice are ineffective, Section 6 of the 2007 Act ensures that the Scottish Ministers can take steps to ensure the prevention, control and reduction of such parasites. Ultimately, such steps may require the discharge of chemicals into the water environment in order to bring the levels of parasite under control. Accordingly, we propose to designate the 2007 Act so as to formalise the policy intention underpinning section 6 – that the Scottish Ministers (FRS) and SEPA will work collaboratively with each other in such circumstances to identify an appropriate balance between the protection of the water environment and fish health issues.

## **Diseases of Fish Act 1937** (“the 1937 Act”)

Scotland has international obligations to protect our Atlantic salmon populations, and the 1937 Act (as amended) provides a range of powers in order to prevent the spreading of disease among salmon and freshwater fish. In particular, section 5A of the 1937 Act confers powers on the Scottish Ministers to arrange for the creation of barriers to the movement of fish in inland waters in Scotland where necessary or appropriate to contain any outbreak of the parasite known as *Gyrodactylus salaris* (“GS”) and to facilitate the treatment of the water environment with chemical agents with a view to achieving eradication. Ministers are also given powers to maintain, dismantle and remove any such barriers. Section 5B then explicitly confers powers on the Scottish Ministers to arrange for the treatment with chemical agents of specified waters with a view to eradicating GS.

Clearly any such treatment has the potential to have a significant effect on the water environment. Therefore, by designating Ministers’ functions under the 1937 Act, we will ensure that such powers may only be exercised in compliance with the Directive.

The Scottish Government’s *Gyrodactylus salaris contingency plan* sets out the respective roles and responsibilities of relevant organisations in dealing with any outbreak of GS; thus in practice we anticipate that FRS and SEPA will work closely together to achieve an appropriate balance between our objectives for fisheries and the water environment, as well as for those industries likely to be affected by such action - including hydropower and the whisky industry. We recognise that further work needs to be done on developing agreed processes, possibly including a fast-track approach to ensure a balanced approach can be delivered promptly and effectively in the event of any outbreak.

## **WFD and hydropower**

Hydropower is an important industry which offers a valuable low-emissions energy source and has the potential to be a major contributor to meeting ambitious renewables targets both in Scotland and across the EU; and help to mitigate the effects of climate change. Hydropower also helps to reduce flooding in some areas by trapping flood waters behind dams, delaying their arrival downstream. Hydropower schemes with an installed capacity above one megawatt require consent under the Electricity Act 1989.

However, hydropower generation also poses significant risks to the water environment, through abstraction, impoundment behind weirs and dams, and particularly through physical alterations to water bodies, such as fixed banks, straightened rivers, and big fluctuations in water level. Changes like these in hydromorphology – watercourse shape and flow patterns – have been identified across Europe as the largest risks to the water environment, and the most likely to prevent WFD ecological objectives being achieved. The hydropower industry takes steps to reduce its impact on the environment, such as ensuring minimum flows are maintained and installing fish passes. However, although overall water loss is often nil, many schemes transfer water from one body to another, or impound it for long periods, which by default have a significant impact on the water ecology. It is therefore likely that further mitigation measures will need to be implemented under the Water Framework Directive.

The Scottish Government's aim in implementing the WFD is to balance sustainable water use with protection of the water environment. A policy framework that balances differing environmental priorities against each other, and against social and economic constraints, is crucial if Europe is to provide a stable environment for business investment in renewable sources of energy, such as hydropower. We have been working with the hydropower industry over a number of years to ensure that we implement the Directive in a way that minimises any impact on hydropower capacity.

There have been a number of legislative steps in our approach to date:

- In 2006 we introduced legislative amendments to the Electricity Act 1989, to prevent duplicate regulation with the requirements introduced by CAR;
- In 2008 the First Minister announced that the responsibilities of the Fisheries Committee would be incorporated within SEPA's regulatory role in implementing WFD;
- During 2008 we plan to revoke the Salmon (Fish Passes and Screens) (Scotland) Regulations 1994, now superseded by CAR.

Thus we do not consider it appropriate to designate the Electricity Act 1989 as a WEWS relevant enactment.

## 6.3 Rural land management

### Policy context

Scottish agriculture is a major land use, with around 75% of Scotland's land area used for agricultural production. Approximately 80% of this area is grassland and is used for livestock farming, particularly the rearing of beef and sheep. Arable farming is also a significant land use, particularly in the east of Scotland.

Rural land use activities can result in diffuse pollution and morphological impacts on the banks and beds of water-courses, which can affect the water environment and associated habitats. It requires a careful approach to address these impacts in a proportionate manner. Within CAR, the Water Environment (Diffuse Pollution) (Scotland) Regulations 2008 provide a baseline of good practice land management measures. Adopting such good practice is expected to reduce the risk of diffuse pollution by managing the land in a way which minimises the potential pollution sources.

Scottish Ministers are currently considering what further steps might be required to meet our WFD obligations, in the context of River Basin Management Planning.

### **WFD and cross-compliance**

The Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Regulations 2004 link the requirement for farmers to meet certain obligations, including environmental responsibilities, with their single farm payment. This includes compliance with respect to: a) Statutory Management Requirements (SMRs) required by law in the areas of animal health, environment and food safety; and b) good agricultural and environmental condition (GAEC) which is set at a national level.

At this point WFD is not recognised formally under SMRs or GAEC and discussions at a European level will determine the extent to which there is applicability in relation to WFD. Possible changes are being considered under the current CAP health check; and we will take any such changes forward as appropriate. In due course the way forward is likely to be formal textual amendments to the Regulations; thus we do not currently consider it appropriate to designate these as a WEWS relevant enactment.

### **The Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006** ("the 2006 Regulations")

The 2006 Regulations deal specifically with projects relating to

- the conversion of uncultivated land and semi-natural areas for intensive agricultural purposes; and
- the large-scale restructuring of rural land holdings involving agricultural land; which do not require planning permission.

Under the 2006 Regulations, Scottish Ministers are the decision making body in relation to permitting relevant projects to proceed and setting any conditions in

relation to the carrying out of the project. By designating these Regulations as a WEWS relevant enactment, Ministers will be required to exercise their functions under these regulations in such a way as to secure compliance with the WFD.

### **Scotland Rural Development Programme**

The Scotland Rural Development Programme (2007-13) is the key document which defines measures and supports the achievement of the policy outcomes set out in the Strategic Rural Development Plan for Scotland. The underpinning Rural Development Contracts (Rural Priorities) (Scotland) Regulations 2008 recognise CAR and therefore there are opportunities within the programme to link potential measures under the RBMPs with regional priorities under the SRDP. We recognise that we can make progress towards delivering our joint objectives by continuing to address pressures on the water environment according to rural priorities up to 2014.

Looking beyond 2013, the Scottish Government will consider whether there are opportunities to identify additional measures which could be incorporated into the list of options, to help achieve WFD objectives. Any suggestions for additional options and measures within future iterations of the programme will need to be considered in relation to the overall rural development priorities and the balance of funding and delivery of outcomes from the programme.

It is this approach which will ensure we make appropriate linkages between WFD and the SRDP; and thus we do not consider it appropriate to designate the 2008 Regulations as a WEWS relevant enactment.

## 6.4 Sustainable transport

### Policy context

New infrastructure development and work to maintain and manage transport networks are key to Scotland's success. These activities can affect river basins, influencing the morphology of water bodies and contributing to diffuse and point source pollution loads. The planning, design, construction and operation of transport networks is now subject to regulation and control under the Controlled Activities Regulations (CAR). Transport Scotland (an Executive Agency of the Scottish Government) undertakes these requirements in fulfilling its duties to deliver Scotland's capital investment programme for transport and in overseeing the trunk road and rail network operations.

In order to minimise the effects of pollution from road run-off on the water environment and potential flood risk, Transport Scotland endeavours to incorporate Sustainable Urban Drainage Systems (SUDS) measures in new trunk road schemes wherever practicable, with the proviso that the effectiveness of the drainage is not compromised. Local authorities are encouraged to use SUDS techniques in the drainage of roads for which they are responsible, and to reach agreements with Scottish Water on integrated drainage.

### Roads (Scotland) Act 1984 ("the 1984 Act")

Section 2, 7 and 19 of the 1984 Act confer powers on the Secretary of State (now the Scottish Ministers) to construct and maintain trunk and special roads.

By designating this Act as a WEWS relevant enactment, Ministers will be expected to consider possible impacts on the water environment when carrying out their functions under this Act. This will, for example, require Ministers to –

- Consider the route of any such transport system so as to avoid or minimise:
  - the need to divert, realign, culvert or otherwise reinforce any part of the water environment;
  - the loss of potential to enhance or restore the status of the water environment;
  - the use of routes at risk from flooding, considering the anticipated long-term position;
  - the need for modifications to the water environment or to flood plains. Such modifications may enhance flood risk elsewhere by, for example, reducing flood water storage;
- Ensure that where engineering modifications to the water environment are necessary, all practicable mitigations are incorporated into the choice and design of those works so as to avoid or minimise deterioration of the water environment;
- Consider incorporating sustainable urban drainage systems with an agreed maintenance programme as an integral part of any such transport system. This will help to avoid increasing flood risk elsewhere and protect the water environment against pollution from water run-off.

## **Transport and Works (Scotland) Act 2007** (“the 2007 Act”)

The 2007 Act takes forward the Scottish Ministers’ commitment to introducing an efficient regime for the authorisation of certain transport systems in Scotland. With this in mind, Part 1 of the 2007 Act confers powers on the Scottish Ministers to enable them to authorise, by Order, the construction or operation of specified types of transport system, as well as connected matters. Consequently, the effect of Part 1 of the 2007 Act is to remove the requirement for individual Private Bills for specified types of transport development in Scotland (for example, the types of rail developments that have been brought forward for Glasgow Airport and Airdrie-Bathgate over the last few years.) Such developments will now be regulated according to the procedures established by the 2007 Act regime, including the range of subordinate legislation to be made in due course.

A key objective of the 2007 Act is to ensure that consideration and authorisation of such transport proposals can take place as expeditiously as possible. Scottish Ministers have been conferred with powers for an Order under the 2007 Act to disapply the statutory requirements for other related consents, permissions, licences etc. It is however generally expected that CAR will be the vehicle for delivering our WFD obligations, and this is being made clear in the guidance accompanying the Act. Nevertheless we believe that designation of the 2007 Act makes it transparent that Ministers, should they elect to disapply CAR, will require to put in place procedures that ensure our WFD obligations can be met.

### **6.5 Land use planning**

#### **Policy context**

The land use planning system exists to guide the future development and use of land in Scotland. It plays an important role in shaping and protecting the quality of towns, cities and countryside. The planning system in Scotland is currently undergoing significant modernisation, and The Planning etc (Scotland) Act 2006, which amends the Town and Country Planning (Scotland) Act 1997, introduces substantial new provisions. Work has already begun to implement these. The 3 main delivery mechanisms for the modernised planning system are outlined below.

a) Firstly, the Scottish Ministers have responsibility for preparing and publishing a **National Planning Framework** (NPF). The Framework plays a key role in co-ordinating policies with a spatial dimension and integrating and aligning strategic investment priorities. It focuses strongly on priorities for the improvement of strategic infrastructure to support Scotland’s long-term development.. The NPF provides a national context for development plans and planning decisions and informs the ongoing programmes of the Scottish Government, public agencies and local authorities. The Framework is a key element in the modernised planning system.

The recent Planning etc. (Scotland) Act 2006 puts the Framework on a statutory footing which requires planning authorities to take the NPF into account in preparing

their development plans. The Planning Act also makes provision for the Framework to be used to designate certain developments as national developments and establishes specific procedures for the consideration of such developments. National Developments may include major water and drainage related projects. Designation in the Framework as a national development establishes the need for such developments.

There are opportunities to create links between the NPF and the RBMPs, by ensuring the two planning processes inform each other:

- The NPF, currently under review, is drawing on information about the water environment identified as part of the preparation of the first draft RBMP. The RBMPs, being introduced in 2009 to manage our water environment, will in turn look to information set out in the NPF;
- In reviewing the Framework, Scottish Ministers will take into account the newly created River Basin Management Plans;
- It is anticipated that when the NPF is further revised in 2012, we can further align the two planning systems.

b) **Development plans** cover a defined geographical area and are the most significant element of the statutory decision making framework for deciding the appropriateness of proposed development. Development plans identify locations where and conditions in which the principle of certain development will be acceptable. Development Plans also address issues of environmental quality and ensuring public involvement in the planning process. Decisions on planning applications must be taken in line with the development plan, unless material consideration indicate otherwise. In a major move to simplify development planning, the Planning etc. (Scotland) Act will introduce a single tier of local development plans across much of Scotland. Within the four largest city regions, there will also be strategic development plans dealing with key land and infrastructure issues which cross planning authority boundaries.

Scotland's planning legislation allows many detailed aspects of the system to be prescribed by the Scottish Ministers through **Regulations**. The Scottish Government has consulted on draft regulations in relation to development planning, which contain two important proposals that could ensure more effective protection of the water environment. These are first that SEPA should be designated as a 'key agency' for development planning. This would require SEPA to be consulted on all strategic development plans and local development plans and require them to respond to the planning authority. Secondly, it is proposed that planning authorities, in drawing up their development plans, should have regard to the relevant river basin management plan.

In relation to both the current and future system of development plans, the Scottish Ministers play an important role. While they have a formal role in approving structure plans (and strategic development plans in future), they also have powers to seek modifications to or even approve local plans (local development plans in future) for example, if there are concerns around the implementation of legislation or national policy. As such, planning legislation provides that before these plans are approved or adopted, the Scottish Ministers have the opportunity to seek to secure compliance with the Directive.

## **WFD and Land Use Planning**

Controls under the WEWS Act and the planning system should complement each other. There is a range of issues where both are likely to have a role including:

- Using good drainage design to minimise the risk of deterioration of status or of flooding arising from new development,
- Provision of sustainable urban drainage systems ;
- Retaining watercourses in their natural state;
- Safeguarding the flood storage capacity of functional flood plains;
- Considering proposals which could enhance the ecological quality of the environment;
- Supporting the restoration of the water environment, for example, through removing disused engineering works including culverts, providing for effective treatment of mine water discharges, creation of fish passes, and incorporation of habitat improvements; and
- Considering whether proposed developments can be connected to the public sewer system or whether private waste water treatment systems would be adequate.

c) **Development Management** (previously known as Development Control) is a term defined in law which relates to the process of applying for planning permission for work defined as 'development'. This includes a wide range of building and engineering work as well as changes in the way land and buildings are used. Planning law also covers changes to listed buildings and control of advertisements as well as enforcement of planning law. In the modernised planning system applications for planning permission will be processed and scrutinised depending on whether they raise issues of national, major, local or minor importance.

### **Town and Country Planning (Scotland) Act 1997** ("the 1997 Act")

Although the Planning etc Act sets out the mechanisms for modernising the planning system, it does so by amending the Town and Country Planning (Scotland) Act 1997. In legal terms it is therefore the 1997 Act which requires to be designated to ensure that the planning system and river basin management planning are effectively co-ordinated to meet our joint aims.

## 6.6 Sustainable flood management and surface drainage

### **Policy context**

Flooding can have serious effects on people, their homes and businesses, and their health. Current estimates suggest that almost 100,000 properties in Scotland are either at risk of fluvial flooding or lie within coastal flood zones. Flooding may also arise from sewers overflowing and from the overland flow of surface water (pluvial flooding), as a result of heavy and intense rainfall. More generally, flooding impacts on the transport infrastructure and on many other aspects of people's lives. There is a growing recognition that we must take a more holistic approach to flood risk management. The local effects of inland flooding can be exacerbated by the way our river catchments are used and managed. To be effective, solutions must be sought and planned across catchments.

A wide range of legislation underpins flood risk management in Scotland. Much of this does not interact well with modern approaches to flood risk management, which are underpinned by catchment focused planning of a range of measures to alleviate and avoid flood risk. The WEWS Act supports these approaches by introducing requirements for sustainable flood management; and the proposed Flooding Bill will address these matters in a more holistic way.

Currently flood prevention schemes are confirmed by Ministers, but may also require authorisation under CAR. We need to encourage good integration in planning stages, to ensure these separate processes can work together effectively. Guidance for responsible authorities explaining how these processes should work in tandem is under development.

The development and long-term maintenance of SUDS is supported by WEWS and CAR. SUDS can attenuate flows and thus reduce flooding risks. SUDS can be a useful part of local flood risk management plans. The Scottish Government is working with Scottish Water, SEPA, developers and local authorities to promote the provision of SUDS features, especially in public places.

### **Flood Prevention (Scotland) Act 1961** (“the 1961 Act”)

The 1961 Act confers a range of powers to enable local authorities to take measures to prevent or mitigate the flooding of non-agricultural land in their areas and for connected purposes. As a WEWS Responsible Authority, each local authority is obliged to exercise its normal functions under the 1961 Act so as to secure compliance with the requirements of the Directive. In addition, they are required to comply with the duties specified in section 2(4) of the WEWS Act.

As such, when exercising their functions under the 1961 Act, the local authorities are required to ensure that any flood prevention scheme and any modifications to it embody WFD requirements from the outset; for example, by taking steps to ensure that the proposal incorporates all practicable mitigation in the choice and design of schemes with the aim of avoiding or minimising any adverse impacts of proposed solutions on the water environment.

The Scottish Ministers are currently responsible for confirming such schemes as made by the Councils, in terms of section 4(1) of the 1961 Act. But in doing so, the Scottish Ministers also have the power to confirm the flood prevention scheme with or without modifications as they think fit. In our view, this power introduces a degree of discretion upon the Scottish Ministers which would permit them to innovate upon the scheme that has been proposed by the Council where appropriate.

For this reason, we consider it is desirable to designate the 1961 Act in respect of Ministers' functions. This approach also demonstrates our commitment to developing a joined-up policy that delivers our obligations for both WFD and sustainable flood management.

### **Coast Protection Act 1949** ("the 1949 Act")

The 1949 Act provides mainly for the protection of the land from the seas through the construction and maintenance of coast protection schemes. It gives Ministers powers to confirm schemes designed to prevent coastal flooding. For the sake of consistency with the 1961 Act, we propose to designate this as a WEWS relevant enactment.

Local authorities also have similar functions to those in the 1961 Act, and so we propose to <b>update our designation of responsible authorities</b> to include the functions of the 1949 Act.
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### **Future steps**

We will use the development of the forthcoming Flooding Bill to incorporate WFD obligations. It is likely that once the Bill is enacted, it will be identified for designation as a WEWS relevant enactment.

## **6.7 Water supply**

### **Policy context**

Scottish Water provides essential water and wastewater services to businesses and over 2.2 million homes. As well as its essential role in providing clean affordable drinking water and good sewerage services, Scotland's water industry also plays an important role in the continuing improvement of Scotland's aquatic environment. Considerable recent investment in infrastructure has already led to improvements in drinking water quality, and significant reductions in pollution in rivers, estuaries and coastal waters. Investment has also reduced instances of flooding, as well as providing better quality services for customers. Ministers will shortly be starting the process of identifying the objectives for the water industry for the period 2010-14.

Scotland is taking a risk assessment approach to the management and protection of public and private drinking water supplies. This is in line with the approach recommended by the World Health Organisation for drinking water quality and is likely to be adopted under the revised Drinking Water Directive. The WFD also recognises the need to protect drinking water sources. Our need to manage any

pressures in those areas will be supported by Scottish legislation and funding programmes (such as WEWS, CAR, Nitrate Vulnerable Zone Action Programme, and the Scottish Rural Development Programme).

Water Safety Plans (WSPs) are being developed for public water supplies by Scottish Water, in association with SEPA and Scotland's Drinking Water Quality Regulator (DWQR). These will be a planning tool providing protection for public water supplies and will be aligned with the river basin management plan and regulatory action under CAR. Scottish Water has prepared an initial phase of draft WSPs which are being considered by the regulators and plan to prepare an additional 20 WSPs in 2007-08.

The *Private Water Supplies (Scotland) Regulations 2006* include a requirement for a risk based assessment of large private water supplies for public and commercial use. Local authorities enforce the regulations as part of their wider public health role. For private water supplies attached to individual properties, owners are encouraged to assess if there are any risks, and if required, seek advice from the relevant local authorities regarding appropriate steps to lessen those risks.

### **Water Industry (Scotland) Act 2002** (“the 2002 Act”)

Part III of the 2002 Act establishes Scottish Water as a body corporate, and confers responsibility on it for the discharge of the core water and sewerage functions as laid down principally by the Sewerage (Scotland) Act 1968 and the Water (Scotland) Act 1980. In discharging these functions Scottish Water must make a charges scheme which fixes charges to be paid for the provision of such services. Scottish Water is now a WEWS Responsible Authority and so must consider the requirements of the Directive from the outset of the development of its proposed charging scheme.

The system for determining such charges was amended in 2005 by the Water Services (Scotland) Act in order to clarify the roles of the different parties involved in the charge setting process, ensuring that policy and economic functions are clearly separated. As such, it is the Scottish Ministers who retain responsibility for setting the overall policy framework and are required to issue a statement of policy regarding charges under a charges scheme to both Scottish Water and the Water Industry Commission (“WIC”). It is then a matter for the WIC to determine the lowest reasonable overall cost for delivery of those objectives, and how the relevant costs should be split between different groups of customers.

Consequently, we consider that it will be essential for Ministers to ensure that this overall policy framework takes due account of the requirements of the Directive to recover the costs of water services in line with the polluter pays principle; for example, through the appropriate use of water pricing structures in order to provide adequate incentives for different types of water users to utilise water resources efficiently.

By designating Ministers' functions under the 2002 Act, we will therefore ensure that the framework within both Scottish Water and the WIC operate takes due account of the Directive's requirements.

**Urban Waste Water Treatment (Scotland) Regulations 1994** (“the 1994 Regulations”)

The 1994 Regulations set out duties on Scottish Ministers to identify sensitive areas, and on Scottish Water to

- provide and maintain collecting and treatment systems,
- to treat waste to a certain level, and
- to exercise their functions under COPA to meet quality standards.

We believe that the powers of Scottish Ministers powers in this regard are not of a nature to merit designation. However we believe to is important to designate Scottish Water to ensure that they exercise their functions under the 1994 Regulations to secure compliance with WFD; and so we propose to **update our designation of responsible authorities** to include the functions of the 1994 Regulations.

**Natural Heritage (Scotland) Act 1991** (“the 1991 Act”)

The 1991 Act provides a mechanism to enable Scottish Water to abstract sufficient quantities of water to maintain the public water supply, in so far as possible, during a drought situation. In particular, Part III of the 1991 Act empowers the Scottish Ministers, on the application of Scottish Water, to grant a drought order. Such an order may contain provisions to meet the short-term deficiency (for example, authorising Scottish Water to take water from another source subject to appropriate mitigation measures). Before the order may be granted, Scottish Water must be able to demonstrate that intensified efforts have been made to reduce leakage, rezone supplies and use redundant sources; and that these measures have been insufficient to address the situation.

In the most severe drought situations, where the deficiency is likely to impair the economic or social well-being of persons in the area, the Scottish Ministers also have the power to require more stringent steps to be taken to address the situation (for example, by authorising Scottish Water to prohibit or limit the use of water for such purposes as the Scottish Ministers think fit). Accordingly, by designating Ministers’ functions under the 1991 Act, we will make clear our expectation that Ministers must give due regard to the requirements of the Directive when taking such decisions. Designation will also afford Ministers the essential flexibility to ensure that an appropriate balance can be struck between environmental, social and economic considerations in any drought situation.

The Scottish Government is currently considering whether these existing provisions needs further alignment with the provisions of CAR, to ensure that appropriate action can be taken in emergency situations as a result of drought.

## 6.8 Environmental legislation

### Policy context

In addition to the Water Framework Directive, a number of other Directives exist with the aim of protecting certain aspects of the water environment. The achievement of the requirements set out in these Directives form the 'basic measures' required to implement the WFD. These 'basic measures' are achieved by means of designating 'protected areas' such as nitrate vulnerable zones and bathing waters, and introducing specific steps to protect those areas.

To strengthen our over-arching framework for the protection of the water environment, we propose to designate the associated legislative provisions, where appropriate, as WEWS relevant enactments.

### The Protection of Water Against Agricultural Nitrate Pollution (Scotland) Regulations 1996 ("the 1996 Regulations")

The 1996 Regulations transpose the requirements of the Nitrates Directive (91/676/EEC) into Scots law. The aim of the Directive is to ensure that measures are taken to reduce and prevent nitrate pollution from agricultural sources.

The 1996 Regulations require Scottish Ministers to introduce action programmes in respect of designated nitrate vulnerable zones, with the aim of reducing water pollution caused by nitrates pollution from agricultural sources. They specify the general provisions that must be set out in the action programmes. The content of these action programmes could have implications for the achievement of our WFD objectives; thus we propose to designate the 1996 Regulations as a WEWS relevant enactment.

### **WFD and nature conservation**

The Conservation (Natural Habitats &c) Regulations 1994 (as amended) transpose the provisions of the Habitats Directive, and it is a condition of the WFD that the Habitats Directive be complied with throughout the River Basin Districts in Scotland. In addition, the 1994 Regulations have recently been amended to oblige the Scottish Ministers and SEPA when exercising their functions under the WEWS Act and CAR to exercise those functions so as to secure compliance with the Habitats Directive.

While the provisions of WFD provide for a relaxation of standards in the case of social and economic factors, the Habitats Directive provides less scope for such relaxation and the WFD provides that where a stricter standard applies under Community law in relation to an area that the WFD shall concede to that stricter standard. As such, we are of the view that there would be little practical effect to be achieved from specifying the functions of the Scottish Ministers and SEPA under the 1994 Regulations. Where the two regimes interact, it will be likely that the Habitats Directive imposes the more stringent standard.

### **The Bathing Waters (Scotland) Regulations 2008** (“the 2008 Regulations”)

The 2008 Regulations transpose the requirements of the revised Bathing Water Directive (2006/7/EC) into Scots law. The Directive introduces tighter microbiological standards than the current Directive (76/160/EEC) alongside new requirements in respect of the provision of information, public involvement and management measures. The primary purpose of the Directive (and therefore Regulations) is to further enhance the protection of bathers’ health. The risks to bathers’ health comes from both point and diffuse sources of bacterial pollution, the former generally from the public sewerage network, the latter mostly from livestock. SEPA is obliged to tackle pollution of this type under the regulations, and in doing so is required to secure compliance with the requirements of the Bathing Water Directive. As these bathing waters will be protected areas within the River Basin Districts and their objectives will be required to be met through the River Basin Management Plans we propose to specify the Bathing Water (Scotland) Regulations as a relevant enactment under WEWS in order to ensure that SEPA carries out its functions in order to secure compliance with the WFD.

The Regulations also introduce duties on local authorities, thus we propose to **update our designation of responsible authorities** to include the functions of the local authorities under the 2008 Regulations.

## 7. SUMMARY AND CONCLUSIONS

### Relevant enactments

Successful implementation of the Water Framework Directive requires an integrated approach to the management of our water resources. Designation of WEWS relevant enactments will support this integration, as Scottish Ministers and SEPA are required to exercise their functions under the designated legislation in a way that promotes the successful delivery of our WFD obligations.

Taking into account the responses to our recent consultation, we have revised our proposals for designation to cover the following legislation:

- Food and Environment Protection Act 1985
- Aquaculture and Fisheries (Scotland) Act 2007
- Diseases of Fish Act 1937
- The Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006
- Roads (Scotland) Act 1984
- Transport and Works (Scotland) Act 2007
- Town and Country Planning (Scotland) Act 1997
- Flood Prevention (Scotland) Act 1961
- Coast Protection Act 1949
- Water Industry (Scotland) Act 2002
- Natural Heritage (Scotland) Act 1991
- The Bathing Waters (Scotland) Regulations 2008
- The Protection of Water Against Agricultural Nitrate Pollution (Scotland) Regulations 1996

### Responsible authorities

This exercise has also highlighted some gaps in our designation of responsible authorities made in 2006. We have therefore updated those designations to include the following:

- Local authorities' functions in respect of flood management under the Coast Protection Act 1949
- Local authorities' functions under the Bathing Water (Scotland) Regulations 2008
- Scottish Water's functions under the Urban Waste Water Treatment (Scotland) Regulations 1994

For simplicity, we have combined the designation of relevant enactments and the updated designation of responsible authorities into a single instrument, **The Water Environment (Relevant Enactments and Designation of Responsible Authorities and Functions ) Order 2008**. The new Order is expected to come into effect in the autumn of 2008. We have revoked the original 2006 Orders.